

***United States Court of Appeals  
for the  
District of Columbia Circuit***



**TRANSCRIPT OF  
RECORD**





4341

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IN THE  
UNITED STATES COURT OF APPEALS  
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 23,171

CONTINENTAL CASUALTY COMPANY, et al.,

v.

AMERICAN SECURITY CORPORATION, et al.,  
MATHER CONSTRUCTION COMPANY, et al.,  
*Appellants,*

MATHER AFB HOUSING NO. TWO, INC., et al.

APPEAL FROM THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLUMBIA

BRIEF FOR APPELLANTS

United States Court of Appeals  
for the District of Columbia Circuit

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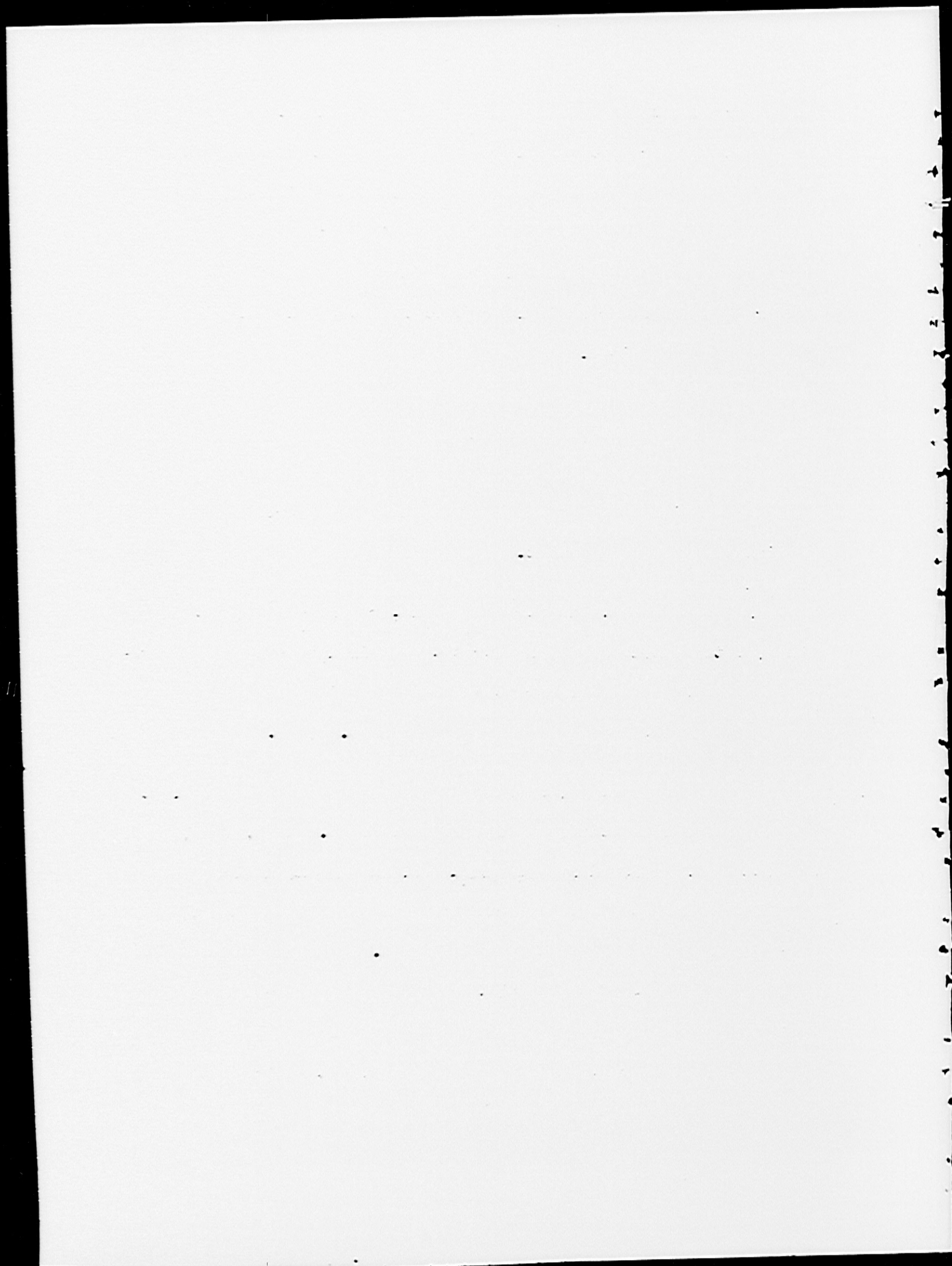
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Appellants,

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APPEAL FROM THE UNITED STATES DISTRICT COURT  
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BRIEF FOR APPELLANTS

## ISSUES PRESENTED FOR REVIEW

1. Whether the Court below erred in dismissing the contention of appellants that there are disputed issues of fact to be determined in a trial by jury on the merits.

2. Whether the appellees, as the moving party, have clearly demonstrated that there is no material issue of fact, and that they are entitled to summary judgment as a matter of law.

3. Whether the terms and conditions of the three Escrow Deposit Agreements raise genuine issues of fact to be resolved in a full hearing on all of the evidence.

4. Whether the Court below erred in failing to find as a matter of law that there are disputed issues of fact, relative to payments claimed to have been made by plaintiffs, which payments have not been identified as applying to the particular project covered by the precise terms of the applicable Escrow Deposit Agreement and none other.

5. Whether the Court below erred in failing to find that the payment of \$24,405.77, by the Escrow Deposit Agent on November 22, 1963, was an erroneous payment made from defendants' funds escrowed for another purpose.

6. Whether the Court below erred in failing to make a full and conclusive determination as to the accrued interest on all three



**Escrow Deposit Agreements.**

7. Whether the Court below erred in failing to make a specific finding as to the disposition of the eligible builders' funds remaining in each of the three Escrow Deposit Agreements, two of which were escrowed at 200% of the estimated cost of completion of all work remaining to be performed.

8. Whether the Court below erred in failing to find that representations and inducements made by plaintiffs to defendants on execution of indemnity agreements wrongfully placed defendants' working capital funds in the control of others.

9. Whether the Court below erred in failing to cite reasons for its Order.

10. Whether the Court below has misconstrued, misinterpreted and misapplied Rule 56 of the Federal Rules of Appellate Procedure, and has ignored the basic law of this and other Federal Courts, including the Supreme Court of The United States, in granting summary judgment in this case.

## STATEMENT PURSUANT TO RULE 8(d)

Pursuant to Rule 8(d) of the General Rules of this Court, counsel for appellants states to the Court that the pending case has NOT previously been before this Court under the same or similar title.

## JURISDICTIONAL STATEMENT

This is an appeal by Mather Construction Company, D & L Construction Company, and J.D. Bradley, Inc., against whom the District Court for the District of Columbia granted an Order for summary judgment on the 15th day of March 1969. The complaint, in three counts, brought by the bonding company against seven co-defendants, including the escrow deposit agent, two agencies of the Federal Government, and the eligible builder, sought to recover the builders' private funds escrowed under the terms of three Escrow Deposit Agreements executed at the final closing of a construction contract among the eligible builder, the escrow deposit agent, the Federal Housing Administration and the Department of the Air Force.

The jurisdiction of the United States District Court for the District of Columbia was alleged under and by virtue of Title 11, District of Columbia Code, 1961 Edition, sections 305 and 306; Title 12, United States Code, section 1702; Title 28, United States Code, section 1352, as amended, and sections 2201 and 2202.

The jurisdiction of this Court is founded on Title 28, U.S. Code, section 1291.

REFERENCES TO RULINGS. Order granting judgment, March 15, 1969 and Order denying reconsideration, March 17, 1969 (App. 39, 41).



## STATEMENT OF THE CASE

This is a contract dispute wherein the basic issue in controversy is the matter of entitlement to the remainder of three Escrow Deposit Agreements originally totalling \$197,600.35, now reduced to \$122,413.00, not including interest, (App. 24, 42). These funds were deposited by the appellants herein, i.e., Mather Construction Company, D & L Construction Company and J.D. Bradley, Inc., with the defendant American Security Corporation, the escrow deposit agent (App. 4).

The parties to the action include the plaintiff Continental Casualty Company, who furnished performance and payment bonds for each of the two mortgage areas involved, identified as Mather AFB Housing No. Two, Inc., FHA Project No. 136-81007-Air 7, and Mather AFB Housing No. Three, Inc., FHA Project No. 136-81008-Air 8 (App. 6,42).

The seven defendants are: the American Security Corporation, the escrow deposit agent; the Commissioner, Federal Housing Administration, who provided the mortgage insurance for the construction; the three appellants herein, the eligible builders who deposited their funds in escrow; Mather AFB Housing No. Two, Inc., and Mather AFB Housing No. Three, Inc., which corporations were originally formed by the eligible builder, and which at time of completion and final closing were transferred to and became the property of the Department of the Air Force (App. 4, 5). The principal defendants are: Mather Construction Company, D & L. Construction Company and J.D.



Bradley, Inc., the eligible builder and their subcontractor, who deposited the funds in escrow (App. 5).

D & L Construction Company and J.D. Bradley, Inc., California corporations, bidding as a joint venture, were awarded a contract to build Capehart housing at Mather Air Force Base, California, and are identified as the "eligible builder" (App. 23). Mather Construction Company, formed for the purpose of constructing the Capehart housing at Mather Air Force Base, was a subcontractor to the eligible builder, D & L Construction Company and J.D. Bradley, Inc. Mather Construction Company included the eligible builder and one Hal B. Hayes and his agents (App. 12, 13).

Following the award by the Air Force of the contract to build the Capehart-financed housing at Mather Air Force Base to the eligible builder, Continental Casualty Company, as an additional requirement for the issuance of the necessary performance and payment bonds, required that the eligible builder strengthen its financial capability and place their working-capital for the construction of the Capehart housing at Mather Air Force Base in the control of one Hal B. Hayes and his agents. (App. 24, 70). Mather Construction Company resulted from this requirement.

Three separate and distinct Escrow Deposit Agreements are involved in this litigation, each one identifying the specific "mortgage area" to which it is limited (App. 6, 9, 10, 12, 49, 54). One, in the amount of \$144,007.95, supported by a letter, dated March 16,

1960, addressed to the Commissioner, Federal Housing Administration, 811 Vermont Avenue, N.W., Washington, 25, D.C., Re: MATHER AFB HOUSING NO. THREE, INC., FHA Project No. 136-81008-Air 8; one in the amount of \$31,532.40, executed on an FHA Form No. 2456, dated March 16, 1960, identifying Mather AFB Housing No. Three, Inc., FHA Project No. 136-81008-Air 8, as the mortgagor for this particular "mortgage area", and attached thereto a Schedule of Alternates, listing the incompleted items of work to be completed and for which 200% of the cost as determined by the Air Force Contracting Officer was escrowed; and the third and final one, also executed on an FHA Form No. 2456, dated the 1st day of February, 1960, in the amount of \$23,950.00, with an attached Schedule of Alternate Items to be completed, also escrowed at 200% of the cost of completion, identifying Mather AFB Housing No. Two, Inc., FHA Project No. 136-81007-Air 7, as the mortgagor for that particular "mortgage area" (App. 12, 49, 54).

These three escrows, originally totalling \$197,600.35, are now, because of releases made by the escrow deposit agent, reduced to the sums of \$72,317.00, \$28,498.00, and \$21,598.00, respectively for a total of \$122,413.00. This sum does not include interest. (App. 6, 9, 10, 44).

Of the three Escrow Deposit Agreements in dispute, two, both of them dated March 16, 1960, are limited to and pertain directly to the mortgage area" identified as Mather AFB Housing No. Three, Inc., FHA Project No. 136-81008-Air 8, the amounts of which are \$144,007.95 and



\$31,532.40 respectively. Each of these two documents set forth in precise form the terms and conditions as well as the specific "mortgage areas" corresponding to the leaseholds held by the mortgagor-builder corporation, i.e., Mather AFB Housing No. Three, Inc., FHA Project No. 136-81008-Air 8 (App. 12, 54). The third, dated February 1, 1960, is limited to and pertains directly to the "mortgage area" identified as Mather AFB Housing No. Two, Inc., FHA Project No. 136-81007-Air 7 (App. 54), the mortgagor-builder corporation holding the lease to that specific area. It was for these specific "mortgage areas" that these funds were escrowed. Each "mortgage area" encompasses its own specific leased-land area, described by metes and bounds, with its own survey and for which the mortgagor-builder corporation holds the lease (App. 5). Each mortgage area" has its own FHA Project number (App. 12, 49, 54), as well as its own performance and payment bonds (App. 13), and actually its own complete contractual entity separately identified with individual mortgage-deed, note, insurance commitment, guaranties, and other closing documents. The "mortgage area" is a physically definitive land area including the buildings and improvements thereon.

Continental Casualty Company brought this action in the United States District Court for the District of Columbia to obtain the remainder of the escrow funds deposited with the defendant American Security Corporation, the escrow deposit agent (App. 4).

The eligible builder (appellants herein) filed their Answer and Counterclaim alleging their entitlement to their funds remaining in

escrow (App. 17). They dispute the allegations, demand trial requiring Continental Casualty Company to establish proof of payment of monies under the terms and conditions of the precise escrow deposit agreements and for the particular "mortgage area" for which these funds were originally escrowed (App. 17, 25, 61, 65).

In support of their claim to the remainder of their escrowed funds, plus interest, the eligible-builder alleges that, prior to the issuance of the bonds, Continental Casualty Company required that Hal B. Hayes and his agents participate in the construction of the Capehart Housing to be built at Mather Air Force Base. Further, that at the same time, the said Hal B. Hayes was engaged in the construction of a number of other major Capehart and similar housing projects, under other corporate identities, at the same Mather Air Force Base; near-by Beale Air Force Base, California; as well as at other Army, Navy and Air Force installations throughout the country. These Hayes' construction projects were all bonded by plaintiff Continental Casualty Company. In many instances the same subcontractors and materialmen who participated in the construction of the Capehart housing located at Mather Air Force Base, California, for the appellants also participated in the construction of such other similar Capehart housing projects, located elsewhere, for the Hayes' people (App. 24, 25, 70).

In their Counterclaim, the eligible-builder alleges that at the time of the commencement of construction, and from time to time thereafter, defendants D & L Construction Company and J.D. Bradley, Inc.,



made deposits and contributions into the working-fund capital of approximately \$200,000.00. which plaintiff Continental Casualty Company required to be placed in the control of one Hal B. Hayes and his agents. Further, that the said Hal B. Hayes and plaintiffs so mingled the working capital funds and contract proceeds of the Mather Capehart construction with those of such other projects, both as to the pricing of labor and materials and the settlement of claims of those furnishing labor and materials, as to cause the aforesaid \$200,000.00 contribution of defendants D & L Construction Company and J.D. Bradley, Inc., to be diverted from the Mather Capehart Housing construction (App. 24, 25, 70).

The president of D & L Construction Company, in an affidavit on behalf of appellants, stated under oath that he knows of his own personal knowledge the facts of the \$200,000.00 deposit into the working-capital fund, which, as a requirement for the issuance of the bonds by plaintiff, was placed in the control of Hal B. Hayes and his agents; that said Hal B. Hayes was engaged in the construction of a 67 unit Bachelor Officers' Quarters housing project at Mather Air Force Base, similar in all respects to the Capehart construction, which was being built at approximately the same time and which project was being administered from the same field construction office at Mather Air Force Base as was the Mather Capehart construction; and that the same Hal B. Hayes was also engaged in the construction of similar Capehart housing projects at nearby Beale Air Force Base, north of Sacramento, California, as well as elsewhere, which projects were all bonded by Contin-

ental Casualty Company; and that in many instances the same subcontractors and materialmen who participated in the Mather Air Force Base Capehart construction, participated in the construction of such other projects (App. 69, 70).

During discovery proceedings it was established that defendant escrow deposit agent, with the concurrence of the Air Force and the Federal Housing Administration, made an erroneous release of \$24,405.77 to a subcontractor who had won an award from the Armed Services Board of Contract Appeals for "extra work", which award should have been paid for by Government funds rather than from the eligible-builders' private funds escrowed for another purpose (App. 31, 32, 37, 38, 39, 43, 44, 62, 63).

Following pretrial proceedings, plaintiff Continental Casualty Company, moved for summary judgment under the provisions of Rule 56 of the Federal Rules of Civil Procedure, which motion was granted by the United States District Court for the District of Columbia (App. 39, 40, 41).

It is from this Order (App. 39, 40, 41) that the eligible builders, as the appellants herein, are asking for review and reversal by this Court (App. 80).



## STATEMENT OF POINTS ON APPEAL

1. The Court below erred in granting the motion for summary judgment in violation of Rule 56 (c) of the Federal Rules of Civil Procedure and the basic law of this and other Federal Courts including the United States Supreme Court, since the record clearly established controverted issues of material fact requiring a trial on the merits.

2. The Court below erred in not requiring the moving party to meet the burden of clearly demonstrating that there is no material issue of fact and that he is entitled to judgment as a matter of law.

3. The Court below erred in failing to accord the party opposing the motion the benefit of all favorable inferences that may reasonably be drawn from the evidence for the purpose of defeating summary action.

4. The Court below erred in not applying the "slightest doubt" rule in a long list of cases which have held that summary judgment should not be granted if there is the slightest doubt as to the facts.

5. The Court below erred in failing to apply the law on liberal construction for the non-moving party as decreed by the Supreme Court.

6. The Court below erred in denying appellants a trial by jury with a full disclosure of all of the evidence available and raised in the pleadings, thereby denying them their rights and property without due process of law as guaranteed by the Constitution.

## ARGUMENT

## POINTS I and II

An analysis of Rule 56 (c), Federal Rules of Civil Procedure, and the interpretation it has received in decisions of this Court and other Federal Courts, including the United States Supreme Court, shows that summary judgment is inappropriate on the factual situation involved.

## A. ANALYSIS OF RULE 56(c) AS INTERPRETED BY THE COURTS

Rule 56 (c) of the Federal Rules of Civil Procedure provides in part: "The judgment sought shall be rendered forthwith if the pleadings, depositions, and admissions on file . . . . show there is no genuine issue as to any material fact . . . ."

This Court has held that the essential question is whether there is any genuine issue of fact to be resolved. The trial court on a motion for summary judgment, and the Court of Appeals, upon review of ruling on such a motion, must require that movant meet the burden of clearly demonstrating that there is no material issue of fact and that he is entitled to judgment as a matter of law. (See *Semaan v. Mumford*, 335 F. 2d 704) (1964).

The United States Supreme Court in *Poller v. Columbia Broadcasting System*, 368 U.S. 464, (1962) with Mr. Justice Clark, speaking for the Court said: "Summary judgment should be entered only when



the pleadings, depositions, affidavits, and admissions on file in the case 'show that (except as to the amount of the damages) there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law'. Rule 56 (c) Federal Rules of Civil Procedure. This rule authorizes summary judgment only where the moving party is entitled to judgment as a matter of law, where it is quite clear what the truth is, . . . . . (and where) no genuine issue remains for trial . . . . . (for) the purpose of the rule is not to cut litigants off from their right of trial by jury if they really have issues to try".

In one of two recent cases before this Court where the issue of summary judgment was considered, (*Olinger v. American Savings and Loan Association*, decided on February 19, 1969, and reported at 409 F. 2d 142,) this Court, after viewing the facts in the light most favorable to the appellant, stated that: "it is for the jury to determine whether the statement (alleged to be libelous) was so understood by the recipients of the letter and whether the charges it contains are, in fact, true. Since these are genuine issues of material fact, we remand for further proceedings not inconsistent with this opinion".

In a recent decision by the Court of Appeals for the 9th Circuit, in *Chapman v. Rudd Paint and Varnish*, reported at 409 F. 2d 635 (1969), the Court noted that "if there were genuine issues as to material facts court should not have disposed of claims by means of summary judgment. Citing Rule 56 (c), Federal Rules of Civil Procedure. The Court also

noted that summary judgment is not to be granted solely because there are no genuine issues of material fact, and it must also appear on the undisputed facts that person making the motion is entitled to judgment as a matter of law."

Again another recent decision in point by the Court of Appeals for the 2nd Circuit, in the case of Lemelson v. Ideal Toy Corp., decided March 28, 1969, and reported at 408 F. 2d 860, the Court stated: "Summary judgment procedure, of course, is available only in cases where there is no genuine issue of material fact. Rule 56 (c) Federal Rules of Civil Procedure. This rule authorizing summary judgment 'only where the moving party is entitled to judgment as a matter of law, where it is quite clear what the truth is, . . . . (and where) no genuine issue remains for trial . . . . (for) the purpose of the rule is not to cut litigants off from their right to trial by jury if they really have issues to try', citing Sartor v. Arkansas Natural Gas Corporation, 321 U.S. 620, 627, 64 S. Ct. 724, 88 L. Ed 967 (1944). On a motion for summary judgment, the court cannot try issues of fact but can only determine whether there are issues of fact to be tried. Citing Empire Electronics Co. v. U.S., 311 F. 2d 175, 179, (2d Circuit 1962). Since there was a triable issue of fact, summary judgment should not have been granted."

In Keating v. Jones Development of Missouri, the Court of Appeals for the 5th Circuit, reported at 398 F. 2d 1011, (1968), with Judge Goldberg speaking for the Court said: "We are compelled to add one more



statistic to the high mortality rate of summary judgments. See Barber v. Motor Vessel 'Blue Cat', 5th Circuit, 1967, 372 F. 2d 626, 627, (footnote 1 and accompanying text). We have cautioned against its 'misguided application' and repeat the warning here. . . . The District Court held that the pleadings and depositions offered by the appellant presented no genuine issue of any material fact and gave judgment to the defendant as a matter of law. We reverse. Without doubt, in our Circuit the sufficiency of evidence for jury submission is measured by federal standards even in diversity cases. North. River Ins. v. Hubbard, 5th Circ., 1968, 391 F. 2d 863, 854; Cater v. Gordon Transport Inc., 5th Circ., 1968, 390 F. 2d 44, 46; Revlon v. Buchanan, 5th Circ., 1959, 271 F. 2d 795, 800. After the Court's thorough analysis of this choice-of-law question in the Cater decision, supra, it expostulated the following federal standard, which is sufficient to award the appellant at bar a jury trial: 'The controlling principle of federal law, therefore, which must be applied is that if the evidence is of such a character that reasonable men exercising impartial judgment may differ in their conclusion, then the case should be submitted to the jury. . . . The corollary to the above rule is the well-established principle that summary judgment can be granted only when there is 'no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law.' Citing Rule 56 (c), FRCP; Poller v. CBS, (1962) 368 U.S. 464, 468, 82 S. Ct. 486, 7 L. Ed. 2d 458, 461; Liberty Leasing Co. Inc. v. Hillsum Sales, 5th Circ., (1967), 380 F. 2d 1013. Parties must al-

ways be afforded a trial when there is a bona fide dispute of fact between them. *Assoc. Press v. U.S.*, 1945, 326 U.S. 1, 5-6, 65 S. Ct. 146, 89 L. Ed. 2013; *Diplomat Electric v. Westinghouse*, 5th Circ., (1967) 378 F. 2d 377, 386. Moreover, even when there is agreement concerning the facts, summary judgment may not always be granted. As the Court stated in *American Fid. and Cas. Co. v. London and Edinburgh Ins. Co.*, 4th Circ., (1965) 354 F. 2d 214, 216: 'Not merely must the historic facts be free of controversy but also there must be no controversy as to the inferences to be drawn from them. It is often the case that although the basic facts are not in dispute, the parties nonetheless disagree as to the inferences which may properly be drawn. Under such circumstances the case is not one to be decided on a motion for summary judgment,' . . . . . Reversed and remanded."

In the case of *Zahora v. Harnischfeger*, the Court of Appeals for the 7th Circuit ruled on November 27, 1968, reported at 404 F. 2d 172. stated: "The issue before us is whether the District Court properly applied Rule 56 . . . . . in granting defendant's motion for summary judgment. Recently, in *Carter v. Williams*, 7th Circuit, 361 F. 2d 189, 193, (1966) we affirmed our view of the applicable law in this circuit as expressed in *Montoux v. Gulling Auto Electric, Inc.*, 7th Circ. 295 F. 2d 573, 576, (1961), where we said: "While Rule 56 . . . . . unless such evidentiary matters submitted in a particular case clearly show 'that there was no issue of fact to be tried', the Court 'is not permitted to try on the affidavits submitted an issue of fact which is presented by the pleadings.' Citing *Campana Corp. v. Harrison*, 7th Circ.



135 F. 2d 334, 335, 336. Further, the decision noted that: If upon the proofs adduced in support of a motion for summary judgment, any doubt remains as to the existence of a genuine issue of material fact, such doubt must be resolved against the movant for summary judgment and the motion for summary judgment must be denied. Citing *Mitchell v. Pilgrim Holiness Church Corp.*, 7th Circ., 210 F. 2d 879, Certiorari denied, 347 U.S. 1013, 74 S. Ct. 867, 98 L. Ed. 1136.

United States Supreme Court Digest, Lawyers' Edition, Volume 17, (1968), in discussing Rule 56 (c) of the Federal Rules of Civil Procedure as interpreted by the Supreme Court, cites the following cases: *White Motor Company v. U.S.*, 372 U.S. 253, 9 L.Ed. 2d 738, 83 S. Ct. 696 (1963); *U.S. v. Diebold, Inc.*, 369 U.S. 654, 8 L. Ed. 2d 176, 82 S. Ct. 993 (1962); *Poller v. Columbia Broadcasting System*, 368 U.S. 464, 7 L. Ed. 2d 458, 82 S. Ct. 486 (1962); and of particular interest is the decision in *Associated Press v. U.S.*, 326 U.S. 1, 89 L. Ed. 2013, 65 S. Ct. 1416 (1945) where the Court is quoted: "Rule 56 relating to summary judgments should be cautiously invoked to the end that parties may always be afforded a trial where there is a bona fide dispute of facts between them."

The Court of Appeals for the 9th Circuit in *McGuire v. Columbia Broadcasting System*, reported at 399 F. 2d 902 states in part: "The question to be resolved is whether there is sufficient evidence supporting the claimed factual dispute . . . . to require a jury or a judge to resolve the parties' differing versions of the truth at trial."

(Citing First National Bank of Arizona v. Cities Service, 391 U.S. 253, 88 S. Ct. 1575, 1592, 20 L. Ed. 2d 569 - 592)

B. ANALYSIS OF MATERIAL SUBMITTED FOR AND AGAINST MOTION

For the moving party, there are the pleadings in the complaint, none of which is under oath (App. 11); a rambling, self-serving dissertation by counsel asserting extraneous and collateral irrelevancies of the complexities in the administration of the Capehart-Raines statute for the private financing of military housing, set forth in support of his motion for summary judgment; an inconclusive documentary representation, vigorously disputed by the party opposing, which was added as exhibits to the motion for summary judgment; in addition to one affidavit by a home-office executive, filed just before the oral argument by counsel on his motion for summary judgment, which affidavit is in general terms attesting to the truth of the contents of the complaint. It is submitted that the information upon which this corporate executive bases his affidavit is not personal knowledge to him, but is secondary and tertiary hearsay from sources within the corporate structure. Acceptance of this affidavit, in granting a motion for summary judgment, effectively denies the appellants the right of cross-examination to test affiant's credibility.

For the opposing party, there is first a vigorous denial of the major portion of the allegations in the complaint (App. 17 thru 22). Second, there is a definitive Counterclaim (App. 22 thru 25), although not under oath, major portions thereof are confirmed by later affidavit.



This affidavit, by a principal officer of the eligible-builder, is based on personal knowledge (App. 69) and addresses itself to factual issues which are relevant, competent and admissible and which would withstand the scrutiny of cross-examination at trial. Third, there are the searching interrogatories on discovery (App. 26 thru 32), with revealing answers and admissions, under oath, by official representatives of the Federal Government deposing as to matters within their personal and official knowledge (App. 37, 38). Fourth, there is an asserted willingness on behalf of defendant-appellants to negotiate all demonstrated and established proof of claims paid by the plaintiffs or the co-defendant Air Force, pursuant to the precise terms and conditions of the applicable Escrow Deposit Agreement (App.65).

#### C. EVALUATION OF THE MATERIAL SUBMITTED AND THE LAW

A leading text authority, Barron and Holtzhoff, in Federal Practice and Procedure, Rules Edition, Volume 3, in discussing summary judgment in Chapter 11, Page 94, under the subheading (e) "Form of Affidavits: Further Testimony", states: "Supporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein. Sworn or certified copies of all papers or parts thereof referred to in an affidavit shall be attached thereto or served therewith. The Court may permit affidavits to be supplemented or opposed by depositions or further affidavits".

In Section 1237, *supra*, under Form and Sufficiency of Affidavits or Other Documents, the same authority, under Note 43, continues: "Affidavits which contain mere conclusions of law or restatement of allegations of the pleadings are not sufficient to support a motion for summary judgment." Citing: *Walling v. Fairmont Creamery, C.A., 8th Circ., (1943) 139 F. 2d 318*, *U.S. v. Britten, C.A., 3rd Circ., (1947) 161 F. 2d 921*, *Sprague v. Vogt, C.A. 8th Circ., (1945) 150 F. 2d 795*. Continuing, "mere reiteration of what is in the pleadings, seeking to advocate disposition of factual issue favorable to movant rather than to show that there is no factual issue, is not proper function of affidavit in support of motion for summary judgment. *McCoy v. Mosley Machinery Co., 33 F.R.D. 287 (1963)*."

From the material submitted by the moving party, vigorously disputed by the party in opposition, and relying on the interpretation given Rule 56, Federal Rules of Civil Procedure, by the case law, it is clear that there are issues of material fact which compel a trial on the merits.

### POINT III

Federal Courts have repeatedly held that a party opposing summary judgment is entitled to the benefit of all favorable inferences that may reasonably be drawn therefrom.

As the Court of Appeals for the 4th Circuit stated in *American Fidelity and Casualty v. London and Edinburgh Ins. Co.*, reported at



354 F. 2d 214, 216, (1965) "not merely must the historic facts be free of controversy but also there must be no controversy as to the inferences to be drawn therefrom. It is often the case that although the basic facts are not in dispute, the parties nonetheless, disagree as to the inferences which may properly be drawn. Under such circumstances the case is not one to be decided on a motion for summary judgment."

In *Cross v. U.S.*, reported at 336 F. 2d 431 (1964), the Court of Appeals for the 2nd Circuit held that summary judgment is particularly inappropriate where "the inferences which the parties seek to have drawn deal with questions of motive, intent and subjective feeling and emotions". Citing *Empire Electronics v. U.S.*, 311 F. 2d 175 (1962).

In *Dunn v. U.S.*, reported at 278 F. Supp. 885 (1968), the District Court said: "On motions for summary judgment, it is not for the Court to choose between conflicting reasonable inferences from the evidence, even where as here, the weight of the evidence may appear to weigh rather heavily in favor of one of the inferences."

The Court of Appeals for the 7th Circuit, in *Sarkes Tarzian v. U.S.*, 240 F. 2d 467 (1957) stated: "The drawing of inferences arising out of the evidentiary facts - whether disputed or undisputed - is ordinarily for the fact finder. Thus summary judgment must be denied if the evidence is such that conflicting inferences could be drawn."

In *Phoenix Savings and Loan v. Aetna Casualty and Surety Co.*, reported at 381 F. 2d 245 (1967), the Court for the 4th Circuit stated:

"It is well settled that summary judgment should not be granted unless the entire record shows a right to judgment with such clarity as to leave no room for controversy and establishes affirmatively that the adverse party cannot prevail under any circumstances. Neither should summary judgment be granted if the evidence is such that conflicting inferences may be drawn therefrom, or if reasonable men might reach different conclusions."

#### POINT IV

The "slightest doubt" rule as held by the Courts precludes a motion for summary judgment.

In *Morrissey v. Proctor and Gamble*, reported at 379 F. 2d 675 (1967), the Court of Appeals for the 1st Circuit, held that: "Summary judgment may not be granted where there is the slightest doubt as to the facts." Citing: *Peckham v. Ronrico*, 171 F. 2d 653 (1948).

The Court for the 7th Circuit in *Greenebaum Mortgage Co. v. Town and Garden Association*, reported at 385 F. 2d 347 (1967) (Rehearing denied) noted in deciding whether there is an issue of material fact in a case, all doubts must be resolved against the party asking for summary judgment. Citing *Cox v. American Fidelity & Casualty Co.*, 249 F. 2d 616 (1957). Continuing the Court concluded that "although certainty that there are no unresolved factual issues is necessary to grant summary judgment, any uncertainty in that re-



gard is sufficient to deny summary judgment."

The noted text authority, Barron and Holtzhoff, *supra*, in Note 53.1, discussing the meaning of the slightest doubt rule, states: "A long line of cases have held that summary judgment should not be granted if there is the slightest doubt as to the facts; which is actually another way of stating that there is no genuine issue of any material fact." Citing *National Screen Service v. Poster Exchange*, 305 F. 2d 647, 651, (1962). Quoting the Court: "The law is well settled that in order to entitle the moving party to summary judgment, it must be clearly shown: . . . . The rule should be invoked cautiously in order to allow a full trial where there is a bona fide dispute of facts between the parties." The Court continued: "It is no part of the duty of the Court to decide factual issues, but only to determine whether there are factual issues to be tried." Citing *Slagh v. U.S.*, 228 F. 2d 673.

Citing another well-known text authority. Moore's Federal Practice, 2d Edition, Section 56.11 (3), the following appears: "The burden is heavy on the moving party to establish clearly his right to summary judgment." Continuing the same writer says: "Even in cases where the movant has technically discharged his burden, the trial court in the exercise of a sound discretion may decline to grant summary judgment." (Citing Section 56.23, Page 2340, *supra*).

"Slightest doubt", in the instant case, and in view of the authorities cited, on the basis of what is in the record, favors reversal.

## POINT V

A liberal construction favoring the non-moving party is mandatory.

In *Shinabarger v. United Aircraft*, reported at 381 F. 2d 808 (1967) the Court of Appeals for the 2nd Circuit held: "If there is a choice of inferences to be made from the subsidiary facts contained in the affidavits, one of which, viewed in the light most favorable to the party opposing the motion, supports his position, summary judgment is not proper." (Citing *U.S. v. Diebold*, 369 U.S. 654).

The United States Supreme Court in a per curiam decision in *U.S. v. Diebold*, supra, (1962) held: "In summary judgment the inferences to be drawn from the underlying facts contained in such materials must be viewed in the light most favorable to the party opposing the motion."

Viewing the record submitted by the moving party and contrasting that with the persuasive presentation in opposition, it follows that, applying the rule of "liberal construction favoring the non-moving party", there is a compelling mandate for this Court to reverse the decision of the District Court.

## POINT VI

The Constitutional guaranties of due process of law and the right to trial by jury, in suits at common law, proscribe the taking of property by summary judgment.



In *Stevens v. Howard D. Johnson Company*, reported at 181 F. 2d 390, 394 (1950), Judge Parker, the Chief Judge for the 4th Circuit, said: "It must not be forgotten that, in actions at law, trial by jury of disputed questions of fact is guaranteed by the Constitution, and that even questions of law arising in a case involving questions of fact can be more satisfactorily decided when the facts are fully before the court than is possible upon the pleadings and affidavits. The motion for summary judgment, authorized by Rule 56, Federal Rules of Civil Procedure, 28 United States Code, which in effect legalizes the 'speaking' demurrer, has an important place . . . . . in preventing undue delays in trial of actions to which there is no real defense; but it should be granted only where it is perfectly clear that no issue of fact is involved and inquiry into the facts is not desirable to clarify the application of the law."

The Constitutional proscriptions, as set forth in the Fifth and Seventh Amendments, are clear and unequivocal.

#### CONCLUSION

Wherefore, in view of the foregoing argument, points and authorities, it is respectfully submitted that the trial court erred in granting the motion for summary judgment in favor of the moving party, Continental Casualty Company, and upon review, this Court should remand this cause for trial on the merits.

Respectfully submitted,

Carl J. Felth

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for:

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Attorneys for Appellants



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IN THE  
**United States Court of Appeals**  
FOR THE DISTRICT OF COLUMBIA CIRCUIT

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No. 23,171

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CONTINENTAL CASUALTY COMPANY, *et al.*,

v.

AMERICAN SECURITY CORPORATION, *et al.*,  
MATHER CONSTRUCTION COMPANY, *et al.*,  
*Appellants.*

MATHER AFB HOUSING NO. TWO, INC., *et al.*

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Appeal From The United States District Court  
for The District of Columbia

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**REPLY BRIEF FOR APPELLANTS**

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United States Court of Appeals  
for the District of Columbia Circuit

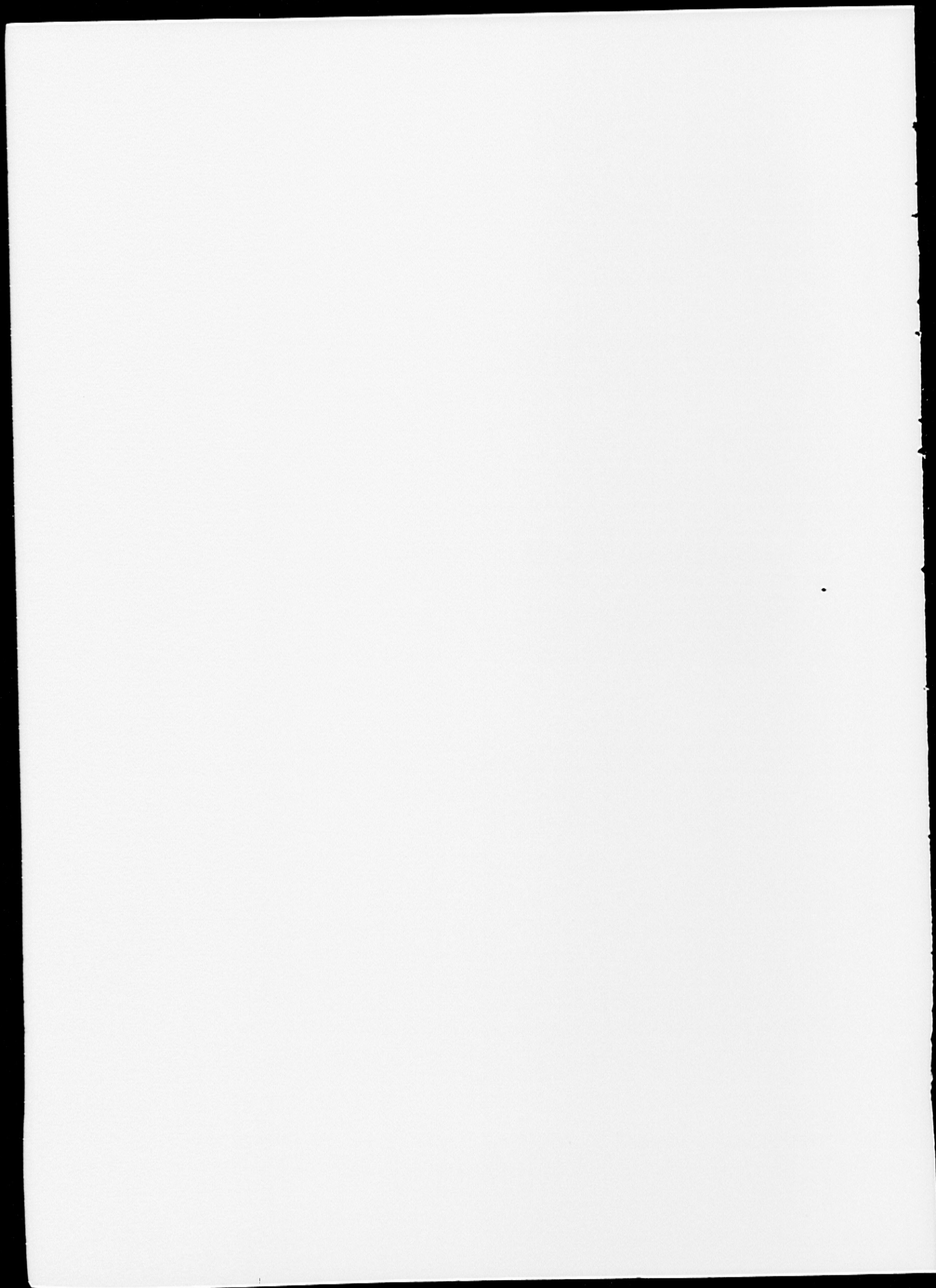
FILED FEB 26 1970

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UNITED STATES COURT OF APPEALS  
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 23171

CONTINENTAL CASUALTY COMPANY, et al.,

v.

AMERICAN SECURITY CORPORATION, et al.,

MATHER CONSTRUCTION COMPANY, et al.,

Appellants,

MATHER AFB HOUSING NO. TWO, INC., et al.

APPEAL FROM THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLUMBIA

REPLY BRIEF FOR APPELLANTS

The original Brief For Appellants Mather Construction Company, D & L Construction Company and J.D. Bradley, Inc., and the Appendix thereto, were filed on 29 July 1969, in compliance with Rule 31 (a) and Rule 30 (a) respectively of the Federal Rules of Appellate Procedure and Rules 8 (c) and 9 (a) of the General Rules Supplementing the Federal Rules of Appellate Procedure.

The Brief For Appellees was served late on 12 February 1970, prior to the Order of this Court, filed on 16 February 1970.

The purpose of this Reply Brief is to clarify issues raised by Brief For Appellees, referred to above.

A. Appellees' statement, "By virtue of having paid out over \$400,000.00 in satisfaction of judgements, . . . . ." is not supported in the record by admissible evidence of fact. (P. 3, Brief For Appellees).

1. Appellants have continuously denied the inference that appellees have "paid out over \$400,000.00, or any sum under the precise terms and conditions of the three Escrow Deposit Agreements and covering the specific areas in question. (P. 19 and 20, Brief For Appellants).

2. Further, appellants have consistently maintained that this is an issue of fact for the jury to determine in a trial on the merits. (P. 21, Brief For Appellants).

3. Appellants respectfully submit that appellees have failed to carry forth their burden of conclusively showing, by admissible evidence, that summary judgment is appropriate. (P. 13 through 26, Brief For Appellants).

B. Appellees' skeletal discussion of their motion for summary judgment, "with supporting documents and, on February 18, 1969, affidavit of James E. Postula . . . ." (P.3, Brief For Appellees), implies that this maze of collateral, extraneous and irrelevant material is admissible evidence. This is unwarranted from an examination



of the material submitted, the law and the authorities. (P's. 13 thru 19, Brief For Appellants).

C. Appellees' Counterstatement Of Facts, (P's. 5 thru 9, Brief For Appellees), sets forth collateral matters which are incidental and irrelevant to the specific matters in dispute, viz., the precise terms and conditions of the three Escrow Deposit Agreements.

1. Appellants deny that the "Release of Liens and Affidavit of Eligible Builder", referred to by appellee (P. 7, Brief for Appellees) was, at the time of closing, inaccurate or calculated to mislead and understate the true factual situation. Appellants submit that this is again an issue of material fact to be determined by the jury in a trial on the merits.

2. Appellants deny the sweeping statements set forth at Pages 5, 6, 7, 8 and 9 of the Brief For Appellees and assert that there is no admissible evidence to support the allegations made therein.

3. Appellants state that if anything is clear, it is that there are several genuine issues of material fact which, applying Rule 56 (c) of the Rules of Federal Civil Procedure and the case law, do not support the summary judgment of the Court below. (P's. 13 thru 26, Brief For Appellants).

D. Referring briefly to matters submitted by appellees in their Argument, beginning at Page 9, Brief For Appellees, appellants deny appellees' conclusions and state that this is further manifestation

of genuine issues of material fact which must be resolved against the moving party where there is the slightest doubt, and with a liberal construction favoring the opposing party, and with all favorable inferences accruing to the party opposing the motion. (P's. 21 thru 25, Brief For Appellants).

1. Appellants deny that appellees' contentions of subrogation, assignment, etc., (P. 9 et seq., Brief For Appellees), are established by the matters submitted in support of their motion for summary judgment with evidence admissible in a trial on the merits.

2. The issue of the affidavits, as raised by the appellees, (P. 23, Brief For Appellees), misinterprets the law and mischaracterizes the evidence submitted by the appellants.

3. As set forth at Pages 19 and 20, Brief For Appellants, the affidavit by a home-office executive from secondary and tertiary sources within the corporate structure is not within the meaning of the rule of first hand knowledge. Contrariwise, the affidavit of the principal, on-the-job, principal officer of the appellant-eligible builder, from matters to which he is personally privy, meets the requirements of the rule.

4. Appellees' curt dismissal of the matter of interest is not persuasive. (P. 22, Brief For Appellees). They ignore the fact that they included "together with any lawful interest which may be payable thereon", in the Order they prepared for the Court below and signed by the Judge on 15 March 1969. (App. 244 and 245). The summary treatment of the problem of interest referred to appears to be a mat-



ter of capitulation in order to expedite a withdrawal of appellants' escrowed funds on deposit with the Escrow Deposit Agent.

5. Appellants have throughout the pleadings, including their Counterclaim, and as set forth in the "Issues Presented For Review" (P. 2, Brief For Appellants), asserted their claim for interest for the period of approximately 10 years that their funds have remained in the exclusive use, custody and control of an established commercial banking institution acting as the Escrow Deposit Agent. Upon any principle of equity the trial court is presented with a further genuine issue of material fact to be determined in a trial by jury on all of the admissible evidence.

E. One development conspicuously omitted in the Brief for Appellees, and which has occurred since the original Brief For Appellants was filed on 29 July 1969, and which should be included herein to place the entire matter in proper perspective for the Court, is as follows:

1. On 25 November 1969, appellants filed a "Motion For Relief Pending Review", asking this Court to enjoin the release of appellants' escrowed funds to appellees pending a review of the Order for Summary Judgment by this Court, and directing the disbursement of the remaining funds into the Registry of the Court, etc.

2. On 4 December 1969, without the knowledge of appellants and while the motion was before this Court for consideration, appellees proceeded ex parte in the Court below and moved for a consent

judgment whereby they secured the release of the appellants' escrowed funds from the Escrow Deposit Agent and converted them to their own use.

3. Appellants have moved to vacate this Order of 4 December 1969, in the Court below, which motion is currently before that Court for resolution.

4. Pursuant to the Order of this Court of 15 January 1970, enjoining the release of the escrowed funds pending a review of the summary judgment by this Court, appellants place the full posture of the matter in dispute before this Court.

#### COMMENTS

Appellants submit that the sheer volume of the pleadings and the controversial matters in dispute involving a substantial sum of funds, escrowed by the appellants, prove conclusively that there are genuine issues of material fact to be resolved in a full trial before a jury on the merits.

#### CONCLUSION

For the reasons stated herein and on appellants' original brief, it is respectfully submitted that the summary judgment of the Court below should be reversed.

Respectfully submitted,

SIGNED

CARL J. FELTH

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Attorneys for Appellants





UNITED STATES COURT OF APPEALS  
FOR THE DISTRICT OF COLUMBIA CIRCUIT

CONTINENTAL CASUALTY COMPANY, et al.,

v.

AMERICAN SECURITY CORPORATION, et al.,

MATHER CONSTRUCTION COMPANY, et al.,

Appellants,

MATHER AFB HOUSING NO. TWO, INC., et al.

No. 23, 171

United States Court of Appeals  
for the District of Columbia Circuit

FILED NOV 17 1970

PETITION FOR REHEARING

*Nathan J. Paulson*  
CLERK

To The Honorable Judges of The United States Court of Appeals For The  
District of Columbia Circuit:

Mather Construction Company, D & L Construction Company and  
J.D. Bradley, Inc, the defendant-appellants above named, presents this,  
its petition for a rehearing in the above entitled cause, and, in support  
thereof, respectfully show:

I

The Court in its opinion of 3 November 1970, affirming the summary judgment of the District Court has, in the opinion of the petitioners, overlooked or misapprehended the following stated facts, all of which are a part of the record before this Court as hereinafter identified by page reference in the Appendix, previously filed with the Briefs.

II

Referring specifically to Page 4 of the Decision, the Court was



apparently inadvertently misled by counsel's hurried oral argument on the issue of the affidavits. As is supported by affidavit attached hereto and made a part hereof, appellants had definitely put in issue facts of their own, in affidavit form, in the Court below prior to the Order of 15 March 1969, to controvert and challenge the conclusory statements set forth in appellees' affidavit. Such affidavits on behalf of appellants appear at Page 68 and again at Pages 69 through 71 of the Appendix.

Further, counsel in oral argument did not state that appellees' affidavit was the only issue - he said it was one issue.

To this extent the first paragraph of Page 4 of the Decision reflects a misapprehension of the facts of the case, obviously as a result of counsel's inadvertence and misunderstanding of the Court's questions.

### III

Rule 56 (e) of the Federal Rules of Civil Procedure provides in part as follows:

"(e) Form Of Affidavits; Further Testimony; Defense Required. Supporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein. Sworn or certified copies of all papers or parts thereof referred to in an affidavit shall be attached thereto or served therewith. \* \* \*".

The affidavit on behalf of plaintiff-appellees (Page 242 - 243 of the Appendix) does not meet this stated requirement. The papers and documents added as exhibits to plaintiff-appellees' motion for summary judgment, were neither sworn nor certified, nor were they attached nor served therewith.

Specifically, the matters alleged by the affiant to be within his personal knowledge, as well as the truth thereof, when challenged by the opposing party, are not admissible without cross-examination to test the accuracy of his recollection, his competence to testify as to the matters he alleges to be factual, nor that his powers of observation and credibility are beyond dispute.

The affiant is not before the Court where his demeanor, candor, motives, intent, reactions, subjective feelings, personal bias and prejudices and identification with the outcome of the issue in dispute are subject to cross-examination before the judge and jury to properly test his credibility.

In the instant case where the issues are vigorously contested, where a considerable amount of appellants' money is involved, and where detailed matters of accounting practices are subject to close scrutiny, the observations, recollections and personal knowledge of all of the facts alleged by the affiant must be tested by cross-examination to insure full disclosure of all of the evidence. Anything less is a violation of appellants' Constitutional rights to due process of law.

In similar situations Federal Courts, including the United States Supreme Court, have addressed themselves to detailed analyses of the requirements of Rule 56 (e) of the Federal Rules of Civil Procedure. A recent and particularly pertinent case is the decision of the United States Court of Appeals for the 9th Circuit, decided on 6 July 1970, and reported at 429 F.2d 598. This is the case of the United States as plaintiff-appellee v. Dibble, defendant-appellant.



The decision of the Court in this case is quoted in pertinent part as follows: "A summary judgment is neither a method of avoiding the necessity for proving one's case nor a clever procedural gambit whereby claimant can shift to his adversary his burden of proof on one or more issues. (*Adickes v. S.H. Kress & Co.* (1969) 398 U.S. 144, 90 S.Ct. 1598, 26 L.Ed. 142.) To obtain a judgment in favor of a claimant pursuant to his complaint, counter-claim, or cross-claim, the moving party must offer evidence sufficient to support a finding upon every element of his claim for relief, except those elements admitted by his adversary in his pleadings, or by stipulation, or otherwise during the course of pretrial. A plaintiff seeking summary judgment who has failed to produce such evidence on one or more essential elements of his cause of action is no more 'entitled to a judgment' (Rule 56 (c) Fed. R. Civ. Proc.) than is a plaintiff who has fully tried his case and who has neglected to offer evidence sufficient to support a finding on a material issue upon <sup>which</sup> he bears the burden of proof. (See 6 J. Moore, *Federal Practice* (2d ed. 1966) [hereinafter cited as *Moore*] sec. 56.22 (2), at 2825.) In either situation there is a failure of proof."

Further, the Court continued: "Thus far we have ignored the other deficiencies in the Government's moving papers. Those papers did not comply with Rule 56 (e), and summary judgment should not have been predicated on them. (*Automatic Radio Mfg. Co. v. Hazeltine Research, Inc.* (1950) 339 U.S. 827, 831, 70 S.Ct. 894, 94 L.Ed. 1312; *Union Ins. Soc'y of Canton, Ltd. v. William Gluckin & Co.* (2d Cir. 1965) 353 F.2d 946, 952-953; *F.S. Bowen Elec. Co. v. J.D. Hedin Const. Co.* (1963) 114 U.S. App. D.C. 361, 316 F.2d 362; *Washington v. Maricopa County* (9th Cir. 1944) 143 F.2d 871,

cert. denied (1946) 327 U.S. 799, 66 S.Ct. 900, 90 L.Ed. 1024.)<sup>2</sup> (Foot note omitted). Rule 56 (e) requires that affidavits 'shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that that affiant is competent to testify to the matters stated therein. Sworn or certified copies of all papers \* \* \* referred to in an affidavit shall be attached thereto or served therewith.'

The Court continued: "(The) affidavit was not made on personal knowledge; it did not set forth facts as would be admissible in evidence; and it did not show that (affiant) was competent to testify to the matters stated therein."

Further the Court stated: "The exhibits annexed to (affiant's) affidavit are copies of intradepartmental memoranda, copies of letters addressed to third persons by third persons, and copies of documents styled revocation notices addressed to third persons by third persons. None of the documents was authenticated, and all of them were hearsay."

Continuing the decision held: "(Affiant's) affidavit did not lay the foundation for the receipt of the exhibits on any theory. His affidavit consists of a series of legal conclusions unsupported by facts. \* \* \* He did not sign the exhibit, and he states no facts at all from which we could conclude that he could identify the signatures of those who did; he tells us nothing to show how he knows the document to be a correct copy of a genuine contract. The fact that affiant is employed by the Army and that the document was supposedly signed by somebody who is also in the Army is patently insufficient to provide him with the necessary personal knowledge to authenticate it. \* \* \*."



Concluding the decision, the Court stated: "All of the exhibits were hearsay as to Dibble. None of the documents relating to the claimed breach of the master lease would have been admitted over objection at the time of trial. But had the case been tried, it is very doubtful that counsel would have attempted to use a notice of termination to prove a breach. Nor would he have attempted to offer the exhibits in evidence anteceded by the oral testimony of a witness to the same effect as the recitals of (affiant's) affidavit. Because lawyers so often present inadmissible testimony (including their own), in the form of affidavits that they would not consider presenting from a witness stand, should we assume that the belief is common that the rules of evidence vanish when a witness testifies by affidavit rather than from the stand? Testimony presented by affidavit is different from testimony orally delivered, because the affiant is not subject to cross-examination. But that fact leads to greater, not lesser, strictures imposed on the testimony presented by affidavit. (E.g. see Rule 56 (e) Fed. R. Civ. Proc., *DePinto v. Provident Security Life Ins. Co.* (9th Cir.) 374 F.2d 50, cert. denied (1967) 389 U.S. 822, 88 S.Ct. 48, 19 L.Ed.2d 74; *Doza v. American Nat'l Ins. Co.* (8th Cir. 1963) 314 F.2d 230; 6 Moore sec. 56.22.) Because the judgment must be reversed in any event, we decline to comment

\* \* \*."

The decision of this Court referred to above in the case of *F.S. Bowen Elec. Co. v. J.D. Hedin Const. Co.* (1963) 114 U.S.App.D.C. 361, 316 F.2d 362, will not, in the interest of brevity, and since it is known to this Court, be discussed further, except to suggest that this Court has followed a similar rule on affidavit testimony.

Other recent Federal Court decisions discussing the issue of the use of affidavit testimony relied upon by the appellants in their petition for rehearing include the case of Morgan v. Willingham, decided by the Court of Appeals for the 10th Circuit on 21 April 1970, and reported at 424 F.2d 200, where the Court held: "Even so, summary judgment cannot be made to rest on purely conclusory statements, either in pleading or affidavit form." Citing Kletschka v. Driver, 2d Cir. 1969), 411 F.2d 436, 449-450; Howard v. Lyons, 360 U.S. 593, 597-598, 79 S.Ct. 1331.

In the case of City National Bank of Ft. Smith v. Vanderboom, decided by the Court of Appeals for the 8th Circuit on 20 February 1970, (rehearing denied on 20 March 1970) and reported at 422 F.2d 221, the case held that: "On motion for summary judgment inferences to be drawn from underlying facts contained in affidavits, attached exhibits, pleadings, depositions, answers to interrogatories and admissions on file must be viewed in light most favorable to party opposing motion." Further, the case held that: "Summary judgment is an extreme remedy which should not be entered except where movant is entitled to its allowance beyond all doubt."

Another decision by the Circuit Court of Appeals for the 9th Circuit, in the case of the Apple Valley Building and Developing Co. v. Bonanza Air Lines, decided on 3 March 1970, and reported at 423 F.2d 661, the Court held: "Summary judgment is an extraordinary remedy and should only be granted when there is no genuine issue as to any material fact." Further, the Court went on: "The affidavits must be viewed in the light most favorable to the party opposing the motion. So read, the affidavits do raise material issues of fact. A trial is required."



In a decision by the Circuit Court of Appeals for the 5th Circuit, entitled Jones v. Borden Company, decided 15 July 1970, and reported at 430 F.2d 568, the Court in discussing evidence in support of motions for summary judgment, stated that on review of grant of summary judgment, reviewing court looks at the record in light most favorable to the party opposing the motion. Further, it held that summary judgment may be rejected in cases where motive, intent, subjective feelings and reactions, consciousness and conscience are to be searched, and examination and cross-examination are necessary instruments in obtaining the truth. The Court cited Rule 56 (c) and (e) of the Federal Rules of Civil Procedure, in their opinion.

In State of Alaska v. Udall, et al., decided by the 9th Circuit on 19 December 1969, reported at 420 F.2d 938, the issue of affidavits is particularly noted. In this case the State had submitted an affidavit by the Director, Alaskan Division of Lands, stating among other things, "That he has personally examined the records of the Bureau of Land Management and on the basis of his examination he has determined \* \* \*".

The Court held: "No counter affidavit was filed based upon a physical examination of the lands in question. Even if counter affidavits of this kind had been filed, the factual issue would still remain, thereby rendering summary judgment inappropriate. \* \* \*".

In the case of Adickes v. S.H. Kress & Co., decided by the U.S. Supreme Court on 1 June 1970, 398 U.S. 144, 90 S.Ct. 1598, 26 L.Ed.2d 142, the Court held: "Because '[o]n summary judgment the inferences to be drawn from the underlying facts contained in [the moving party's] material must be viewed in the light most favorable to the party opposing the motion'."

Continuing, the Court said: " \* \* \* where the evidentiary matter in support of the motion does not establish the absence of a genuine issue, summary judgment must be denied even if no opposing evidentiary matter is presented." (Underscoring for italics in original text of decision).

Without exhausting all Federal Court decisions, in each of the recent cases mentioned, in addition to those cited previously in the Brief, the Federal Courts, including this Court, have uniformly held that Rule 56 (e) of the Federal Rules of Civil Procedure requires scrupulous examination of affidavits, particularly those submitted by the moving party.

#### IV

The conclusion set forth in the second sentence of the second paragraph at Page 4 of the decision appears to overlook and misapprehend the principal thrust of appellants' case as represented throughout the record. Particular reference is made to the following: "This type of lawsuit, involving as it does numerous financial items, most of which are not in dispute and are susceptible of simple accounting treatment, is ideally suited for determination on summary judgment after appropriate interrogatories and other discovery processes have established that there is no genuine dispute as to any material fact", is an oversimplification and an inaccurate understanding of the facts of this case.

Appellants have continuously disputed in the record below the amounts allegedly paid by appellees and have sought through discovery by interrogatories to plaintiffs (Pages 26-29) and to the other parties (30-32) to resolve this issue. Responses to these interrogatories at Pages 33-34 and 37-38 of the Appendix have clearly established material contradictions of fact requiring a full trial on the merits.



The accuracy of the material and records sought to be established by appellees' affidavit has been consistently challenged by appellants in their "Statement of Genuine Issues", (Pages 57-63), their "Motion For Reconsideration \* \* \*", (Pages 63-67), and their "Points and Authorities of Law \* \* \*" at Pages 72-79 of the Appendix.

V

Page 5 of the decision overlooks the fact that appellants first raised the question of "each and every dollar paid out by the surety companies \* \* \*", in their Answer and Counterclaim at Pages 17 - 25 of the Appendix and have continued to do so throughout the entire record before the Court below.

Page 6 of the decision misapprehends the significance of appellants' challenges to the hearsay evidence sought to be used by appellees in their motion for summary judgment by overlooking the material submitted by appellants to the Court below as shown at Pages 17-102 of the Appendix.

The second paragraph of Page 6 of the decision misapprehends the factual posture of the case. All parties, except appellees, have stated that there was "no list of subcontractors and suppliers for whom the amount of \$144,007.95 was deposited in escrow". ( See Pages 85-90, 30-32, and 37-39 of the Appendix).

The sum placed in this "Special Escrow Account" on 16 March 1960 was \$144,007.95 and not \$72,317.00 as stated in the decision. Further, the statement "that there were outstanding liens totalling \$97,728.44" is not accurate. There may have been outstanding construction bills due following the closing, but these were not outstanding liens. For evidence (initially submitted as Exhibit A to American Security Corporation's Answer to Plain-

tiffs' Interrogatories) that part of these bills had been advanced by appellants, see Pages 91 -92 of the Appendix.

Further, the Court has overlooked the letter from the President of the Mather Construction Company to the FHA, dated 25 April 1960, (Pages 91 & 92 of the Appendix), and incorrectly concluded that no part of the \$97,278.44 constructions costs had been advanced by his firm. Assuming, for purposes of argument, that no further payments were made, there would at best be only \$55,550.91 remaining unpaid on this particular mortgage area and for which the sum of \$144,007.95 was originally escrowed. (See Pages 12, 43, 44, 47, 48, 59-61, 71, 88-90 of the Appendix). (The sum of \$55,550.91 is arrived at by subtracting the sum of \$42,177.53 /the sum on Pages 91-92/ from \$97,278.44.

In addition, the two smaller escrows were not for the benefit of creditors, but were for the express purpose of insuring that the Air Force would be reimbursed for any costs incurred in completing the minor, incomplete, exterior work, principally landscaping, clean-up and repair, left undone after the closing. At no point in appellees' material submitted in behalf of their motion for summary judgment do they remotely suggest that they incurred liability for any such work. If the proceeds of these two escrows are to be forfeited, which appellants vigorously dispute, such funds should go the Government to apply on the mortgage proceeds and not to the appellees. (See Pages 49-57, 62, 65, 87 & 90 of the Appendix).

## VI

A close examination of the material submitted by appellees in support of their motion for summary judgment, particularly the unsworn and uncertified copies of checks allegedly paid, reveal material discrepancies



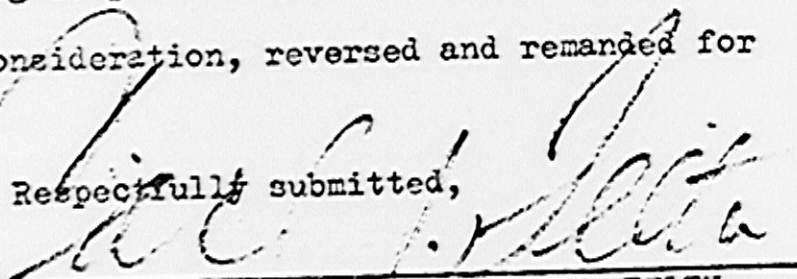
in identification of the precise purpose, scope and relationship of the alleged payments.

As indicated herein and shown in the record of the case before the Court below, there are genuine issues of material fact which under the provisions of Rule 56 (c) and (e) of the Federal Rules of Civil Procedure require a full trial on the merits.

In following the principles as enunciated by this Court and other Federal Courts, including the United States Supreme Court, a party opposing summary judgment should be afforded the opportunity to test the competence and credibility of a moving party's witness on cross-examination.

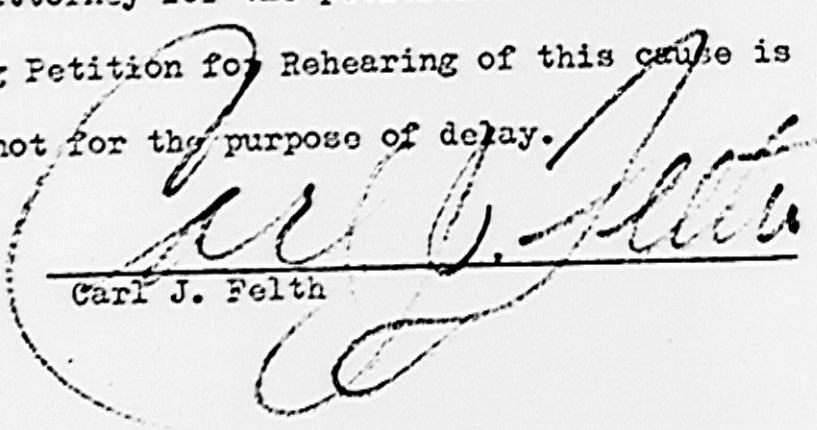
Wherefore, upon the foregoing grounds, it is respectfully urged that this petition for rehearing be granted and that judgment of the District Court be, upon further consideration, reversed and remanded for trial on the merits.

Respectfully submitted,

  
DANIEL J. ANDERSEN and CARL J. FELTH  
600 Woodward Building, Washington, D.C.  
Attorneys for Petitioners RE 7-2153

CERTIFICATE OF COUNSEL

I, Carl J. Felth, attorney for the petitioners herein, do hereby certify that the foregoing Petition for Rehearing of this cause is presented in good faith and not for the purpose of delay.

  
Carl J. Felth

AFFIDAVIT OF CARL J. FELTH  
IN SUPPORT OF APPELLANTS' MOTION FOR  
REHEARING OF CASE ON APPEAL

District of )  
                  ) ss:  
Columbia       )

Carl J. Felth, first being duly sworn, deposes and states that he is one of the attorneys of record before this Court in the case of Continental Casualty Company, et al., v. American Security Corporation, et al., Mather Construction Company, et al., Appellants, and Mather AFB Housing No. Two, Inc., et al., No. 23,171.

Further, that on 20 February 1969, affiant appeared in the United States District Court for the District of Columbia, before the Honorable Judge Oliver Gasch, representing counsel for appellants herein who were defendants in the case in the Court below captioned Continental Casualty Company, and The Fidelity and Casualty Company of New York, plaintiffs, vs. American Security Corporation, et al., defendants, Civil Action No. 2226-65. The purpose of this appearance was to oppose plaintiffs' motion for summary judgment scheduled for hearing at that time.

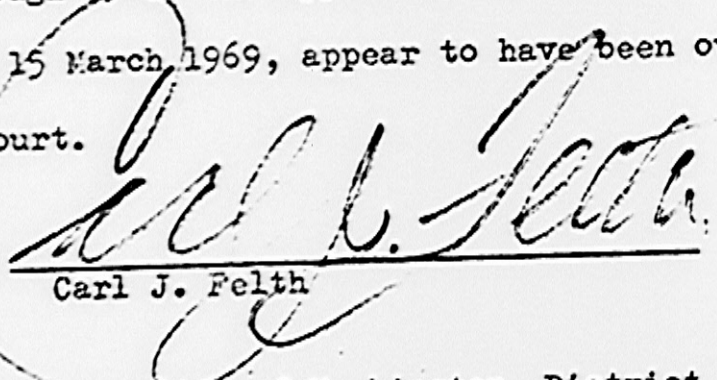
That at approximately 9:50 a.m., on 20 February 1969, in the Court Room, plaintiffs' counsel, Mr. Kahl K. Spriggs, personally handed affiant a copy of the affidavit of James E. Postula, executed on 11 February 1969. This occurred shortly before the case was called for argument and was the very first indication counsel (affiant) had of the existence of any such affidavit.

Further, that in response to the affidavit filed on behalf of plaintiffs, two affidavits on behalf of the appellants herein were filed



before the Court below prior to the Order of 15 March 1970, which Order for Summary Judgment is the subject of this appeal before this Court. These affidavits - one by Carl J. Felth, dated 4 March 1969, and one by D.L. Bradley, the President of D & L Construction Company, one of appellant corporations, dated 13 March 1969, appear in the record of this case before this Court at Pages 68 and 69 through 71 of the Appendix.

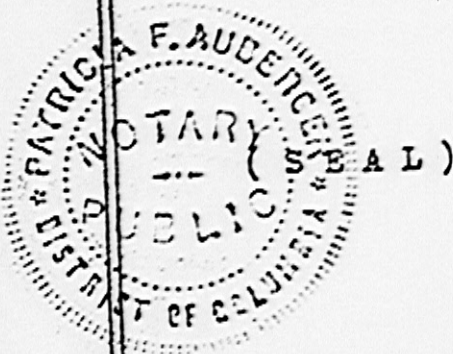
Defendants' (Appellants) Answer to Plaintiffs' Motion for Summary Judgment, at Pages 46 through 57 of the Appendix, and their Statement of Genuine Issues, at Pages 57 through 63 of the Appendix, as well as their Motion for Reconsideration of Plaintiffs' Motion for Summary Judgment, at Pages 63 through 67, together with their Points and Authorities of Law in Support of Defendants' Motion for Reconsideration of Order for Summary Judgment, at Pages 72 through 79 of the Appendix, all before the Court below prior to the Order of 15 March 1969, appear to have been overlooked or misapprehended by the Court.

  
Carl J. Felth

Subscribed and sworn to before me in the City of Washington, District of Columbia, on this the 13 day of November 1970.

  
Notary Public

My Commission Expires June 30, 1974



CERTIFICATE OF SERVICE

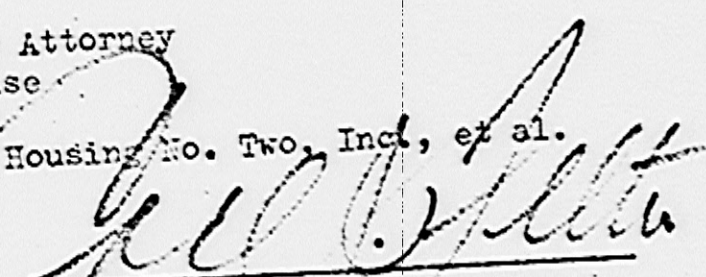
I hereby certify that two (2) copies of the foregoing "Petition For Rehearing" in the case of Continental Casualty Company, et al., v. American Security Corporation, et al., Mather Construction Company, et al., Appellants, and Mather AFB Housing No. Two, Inc., et al., No. 23,171, in the United States Court of Appeals For The District of Columbia Circuit, were served by personally leaving said copies in the offices of the following-designated counsel:

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Counsel for American Security Corporation

John A. Terry, Esquire  
Assistant United States Attorney  
United States Court House  
Washington, D.C. 20001  
Counsel for Mather AFB Housing No. Two, Inc., et al.

Dated at Washington, D.C.  
on this the 17th day of  
November 1970.

  
Carl J. Felth, for  
DANIEL J. ANDERSEN and CARL J. FELTH  
600 Woodward Building  
Washington, D.C. 20005  
RE 7-2153  
Counsel for Appellants